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IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office.
2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

PARTIES TO THE PROCEEDING

Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 72 F.3d 1354. The court of appeals' order denying the petition for rehearing (Pet. App. 32) is reported at 81 F.3d 78. The principal opinion of the district court (Pet. App. 54) is reported at 869 F. Supp. 690. Other published opinions of the district court (Pet. App. at 40 and 74) appear at 858 F. Supp. 902 and 879 F. Supp. 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. A petition for certiorari was filed on May 15, 1996, and granted on June 24, 1996. This Court's jurisdiction is based on 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983 (1994)

42 U.S.C. § 1985 (1994)

FED. R. CIV. P. 40

These provisions are set forth at Pet. App. 79-85.

STATEMENT

Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was based principally on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under federal civil rights statutes and two arising under state tort law, and sought $175,000 in actual and punitive damages for each of the four counts.[1] Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343 (1994).

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[1] The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1994). A third claim alleges that the President thereby inflicted emotional distress upon respondent. Finally, the complaint alleges that in 1994, while he was President, petitioner defamed respondent through statements attributed to the White House Press Secretary and the President's lawyer, denying her much-publicized allegations against the President.

Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. Respondent alleges that Trooper Ferguson approached her on the President's behalf, thereby conspiring with the President to deprive

(continued . . .)

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office. He asserted that such a course was warranted by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed the trial until the President left office, but held that discovery could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]" (Pet. App. 67), which held that a President is absolutely immune from any civil liability for his official acts as President. The district court noted that the holding of *Fitzgerald* did not directly apply to this case because President Clinton was sued primarily for actions taken before he became President, but concluded that a significant part of the rationale in *Fitzgerald* did apply here:

> [T]he majority opinion by Justice Powell [in *Fitzgerald*] is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office.

Pet. App. 68-69. The district court stated that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Pet. App. 69. In this connection, the district

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[1](. . . continued)
respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges that Mr. Ferguson defamed her in statements about a woman identified only as "Paula," which were attributed to an anonymous trooper in an article about President Clinton's personal conduct published in *The American Spectator* magazine. Neither the publication nor the author was named as a defendant in the suit.

court stated that "this [is not] a case that would likely be tried with few demands on Presidential time." Pet. App. 70.

The district court also stated that "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Noting that respondent "filed this action two days before the three-year statute of limitations expired" and that she "[o]bviously . . . was in no rush to get her case to court," the district court found that "a delay in trial . . . will not harm [respondent's] right to recover or cause her undue inconvenience." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge concluded that the trial should be stayed, "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.[2] The trial court ruled, however, that there was "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

The President and respondent both appealed.[3] A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The majority opinion, by Judge Bowman, determined that the Constitution does not confer on the President any protection from civil actions that arise from his unofficial

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[2] The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found that there was "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Pet. App. 71.

[3] The court of appeals' jurisdiction over the President's appeal was based on 28 U.S.C. § 1291 (1994). *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones's cross-appeal. *See infra* pp. 43-45.

acts. Pet. App. 16. Judge Bowman acknowledged that "the fundamental authority" on the question before the Court was *Nixon v. Fitzgerald*, but stated that the reasoning of *Fitzgerald* is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 8, 11. After asserting that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court (Pet. App. 5 n.4), Judge Bowman overturned even that limited stay as an abuse of discretion. Pet. App. 13 n.9.

Judge Bowman also put aside concerns that a trial court's exercise of control over the President's time and priorities through the supervision of discovery and trial would do violence to the separation of powers. Pet. App. 12-14. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13.

Judge Beam "concur[red] in the conclusions reached by Judge Bowman." Pet. App. 17. He acknowledged that the issues in this case "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. *Id.* He also recognized that "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" is a matter of "major concern." Pet. App. 21. He asserted, however, that this litigation could be managed with a "minimum of impact on the President's schedule." Pet. App. 23. This could be accomplished, he suggested, by the President's not attending his own trial and not participating in discovery, and by limiting the number of pretrial encounters between the President and respondent's counsel. Pet. App. 23-24.

Judge Ross dissented. Pet. App. 25-31. Noting that "[n]o other branch of government is entrusted to a single person," he stated: "It is this singularity of the President's con-

stitutional position that calls for protection from civil litigation." Pet. App. 26.

> The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result would disserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Id. Judge Ross concluded that "unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Pet. App. 25. He stated that this conclusion was compelled by the "language, logic and intent" of *Fitzgerald*. Pet. App. 25.

Judge Ross further explained that a lawsuit against a sitting President would "create opportunities for the judiciary to intrude upon the Executive[]" and "set the stage for potential constitutional confrontations between courts and a President." Pet. App. 28. In addition, he noted, such litigation "permit[s] the civil justice system to be used for partisan political purposes." *Id.* At the same time, he stated, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for rehearing *en banc*. Three judges did not participate, and

Judge McMillian dissented. Judge McMillian stated that the panel majority's holding "demean[ed] the Office of the President." Pet. App. 32. He further stated that the holding "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

SUMMARY OF ARGUMENT

I.A. The President, unlike any other federal official, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive Branch. The Framers explicitly recognized this point, as has this Court, on several occasions.

A personal damages action is bound to be burdensome and disruptive. This is especially so in a lawsuit that seeks to impugn a defendant's reputation and threatens him with enormous financial liability. It is inconceivable that anyone, including the President, could remain disengaged from such proceedings. Even if a President ultimately prevails, protracted personal damages litigation would make it impossible for him to devote his undivided energies to one of the most demanding jobs in the world. Judge Learned Hand once commented that, as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness and death."[4] In this respect the President is like any other litigant. The President's litigation, however, like the President's illness, becomes the nation's problem.

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[4] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926), *quoted in Fitzgerald*, 457 U.S. at 763 n.6 (Burger, C.J., concurring).

There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation to advance their objectives. The usual means of discouraging or disposing of unfounded civil complaints would be especially ineffective in these cases.

B. Even the panel majority did not dispute the basic point that personal damages litigation against an incumbent President threatens the functioning of the Executive Branch. Deferral of litigation against an incumbent President would wholly eliminate this problem, while still enabling courts to provide effective relief for wrongdoing. The panel, however, rejected deferral of the litigation as a remedy, and instead concluded that "case management" by the trial court could adequately protect the interests at stake. But "case management" only exacerbates separation of powers problems, by entangling the Executive and Judicial Branches in an ongoing and mutually damaging relationship.

In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of litigation against him, he will have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his official priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive Branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the President and the judiciary, to the great detriment of both branches, in a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities.

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive Branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case management" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

C. The temporary deferral that the President seeks here is not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The public interest in protecting the Presidency from disruption is at least as strong as, if not stronger than, the interests underlying these well-established doctrines.

Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. Deferral of this litigation, by contrast, will not preclude respondent from ultimately seeking a remedy and, if warranted, recovering damages. Deferral

leaves the President no less accountable for his conduct. Only the timing of the litigation is affected.

II. Respondent's suit, in particular, should be deferred under separation of powers principles. The suit is based on conduct that occurred before the President took office, and therefore presents no risk of abuse of Presidential power. Respondent seeks only damages, and can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, or sought other avenues of relief, but chose not to do so.

For these and all the reasons set forth more fully below, the decision of the court of appeals should be reversed, and this litigation should be deferred in its entirety until the President leaves office.

ARGUMENT

I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.

A. A Personal Damages Action Against An Incumbent President Would Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.

1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President. Anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power. The President alone is director of all the executive departments and Commander-In-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. CONST. art. II, §§ 2-3. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group

or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See* THE FEDERALIST Nos. 70-77 (Alexander Hamilton).[5]

The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST. art. I, §§ 4, 5, 7. The Presidency, however, is always "in session;" the Presidency never adjourns.[6] The Constitution further provides specific steps to replace the President in the event of his disability. U.S. CONST. amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

The unadorned words of the Constitution do not fully convey the momentous and unrelenting burdens on every President. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation."[7]

> The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital

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[5] *See* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978): "The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government."

[6] Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

[7] George E. Reedy, *Discovering the Presidency*, N.Y. TIMES, Jan. 20, 1985, at G1, *quoted in* LOU CANNON, PRESIDENT REAGAN -- THE ROLE OF A LIFETIME 147 (1991).

> source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy.[8]

Although he has many advisers, the President alone is ultimately accountable for a myriad of decisions affecting profoundly important questions of national and international policy -- such as dispatching military forces as exigencies require; helping to negotiate peace in regions vital to our national interest; deciding whether to sign or veto legislation; and negotiating with Congress on budgetary, tax and many other crucial issues. The President's obligations to the office, moreover, never cease; serious crises can, and often do, erupt unexpectedly, commanding the President's immediate attention.[9]

> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the

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[8] HAROLD J. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 26 (1940), *quoted in* CANNON, *supra* note 7, at 147.

[9] This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of KAL Flight 007 while on vacation. CANNON, *supra* note 7, at 191, 399, 420. President Carter spent one vacation reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. JIMMY CARTER, KEEPING FAITH -- MEMOIRS OF A PRESIDENT 57 (1982). President Clinton was notified of the terrorist bombing of U.S. military personnel on the eve of the G-7 economic summit, causing him both to change his priorities for the summit and to return to the U.S. before it was over to attend memorial services. Associated Press, *Clinton Calls For Unity Against Terrorism*, CHI. TRIB., June 27, 1996, at A1.

energies of a single man unsurpassed by the exigencies of any other political office in the world.[10]

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With The Historic Understanding Of Relations Between The Executive And Judicial Branches.

The nation's courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753 & n.34. Accordingly, courts historically have refrained from exercising jurisdiction over the President personally, except in cases of imperative need, and then only to the most limited extent possible. *See id.* at 753-54.

This Court repeatedly has recognized that the President's unique status and range of responsibilities under the Constitution distinguish him from all other federal officers. *Id.* at 749-50. A President is absolutely immune from personal liability for any action taken in connection with his official duties. *Id.* at 749. A President's communications are presumptively privileged, and that privilege can be overridden only in cases of exceptionally strong public need. *United States v. Nixon*, 418 U.S. 683, 705 (1974). Similarly, there is an "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular executive acts. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring); *see id.* at 802-03 (plurality opinion of O'Connor, J.). And the Department of Justice, speaking through then-Solicitor General Robert H. Bork, has taken the position -- based on explicit language in *The Federalist* -- that while an incumbent Vice-President is subject to criminal prosecution, the President

[10] LASKI, *supra* note 8, at 26.

must be impeached and removed from office before he can be prosecuted.[11] All of these protections are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.[12]

This tradition of judicial deference and restraint toward the Presidency -- a tradition that "can be traced far back into our constitutional history" (*Fitzgerald*, 457 U.S. at 753 n.34) -- bars personal damages litigation against an incumbent President. Over 150 years ago, Justice Story explained why such litigation cannot go forward while the President is in office:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included

[11] *See* THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 77, at 464 (Alexander Hamilton); *id.* No. 65, at 398-99 (Alexander Hamilton); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1966) (noting the comment of Gouvenour Morris); *id.* at 626 (comment of James Wilson). Solicitor General Bork explained that the unique burdens of the President's duties distinguished him in this regard from all other federal officers:

> [The Framers] assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17, *In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972*, (No. 73-965) (D. Md. filed Oct. 5, 1973) (C.A. App. 92).

[12] This Court repeatedly has stated that a specific textual basis is not necessary to support such incidents of the President's office. *Fitzgerald*, 457 U.S. at 750 n.31; *Nixon*, 418 U.S. at 705 n.16.

> the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833), *quoted in Fitzgerald*, 457 U.S. at 749.

The second and third Presidents of the United States held the same view. John Adams explained that the President personally is not subject to any process whatever, for to permit otherwise would "put it in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government."[13] President Jefferson was even more emphatic:

> [W]ould the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?[14]

As this court stated in *Fitzgerald*, "nothing in [the Framers'] debates suggests an expectation that the President would be

[13] THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (recording a discussion between then-Vice President Adams and Senator Oliver Ellsworth during the first Congress) (Kenneth R. Bowling and Helen E. Veit eds., 1988).

[14] 10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905) (emphasis in original), *quoted in Fitzgerald*, 457 U.S. at 751 n.31.

subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31.[15]

The traditional practice has been fully consistent with this historical doctrine. It is, of course, "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *Fitzgerald*, 457 U.S. at 753-54, and Presidents, including this one, have sought to accommodate the interests of the courts, particularly their interest in the fair administration of criminal justice, where accommodation can be accomplished consistent with Presidential functions. *See infra* pp. 26-28. These interests have not heretofore been thought to require an incumbent President's participation as a defendant in a private civil damages suit, however.

To the contrary, it "has been taken for granted for nearly two centuries," *Fitzgerald*, 457 U.S. at 758 (Burger, C.J., concurring), that one could not hale an incumbent President into court and seek damages from him personally. So far as can be determined, no President has ever been required even to give evidence in a civil proceeding, let alone appear as a defendant. No President has ever been compelled to appear personally and testify at trial in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.[16] Three other Presidents had civil damages litigation pending against

[15] While there are some statements by contemporaries of the Framers that questioned the notion of Presidential immunity to civil suit, the majority in *Fitzgerald* observed in response that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

[16] *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in; and none was actively litigated while the defendant served as President.[17] This "prolonged reticence" about suing an incumbent President is powerful evidence of a nearly universal understanding that such litigation is inconsistent with our constitutional scheme. *See Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1458 (1995).

In *Fitzgerald*, the Court explained that historically the President has been subjected to a court's jurisdiction only when necessary to serve a compelling, broad-based constitu-

[17] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, *id.*, nine months before he assumed the Presidency. The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. *Id.*

In *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944, *id.* at 31, and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. *Id.* at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car leased to his campaign. Complaint, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated) (C.A. App. 128, 135) (hereinafter "*Bailey*"). The court did not permit the plaintiffs to take the President's deposition, permitting the President to respond by way of written interrogatories. *Bailey*, Order Denying Motion for Deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra* note 22.

tional or public interest, and only when the exercise of jurisdiction would not unduly intrude on the functions of the office. 457 U.S. at 753-54. The Court gave two examples of such exceptional cases: those seeking to curb abuses of Presidential authority and maintain separation of powers, *id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); and those seeking to vindicate the public interest in criminal prosecutions. *Id.* (citing *United States v. Nixon*, 418 U.S. at 703-13). Noting that there is a lesser public interest in actions for civil damages than in criminal proceedings, *id.* at 754 n.37, the Court in *Fitzgerald* concluded that a "merely private suit for damages based on a President's official acts" does not warrant the exercise of jurisdiction over a President. *Id.* at 754.[18]

Until the unprecedented decision by the court of appeals in this case, private civil damages litigation has not been thought to warrant an exception to the teaching of the Framers. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*. To allow it to proceed would be an abrupt break with well-established principles of American jurisprudence.

[18] In the few cases where plaintiffs have sought to compel or restrain official action by a President, courts consistently have resorted to procedural or jurisdictional devices to dismiss the claims or to avoid issuing relief directed at the President personally. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866) (discretionary Presidential decision-making held unreviewable); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissed for lack of ripeness). *See also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion of O'Connor, J.) (relief may be directed to defendants other than President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Discharge His Constitutional Responsibilities.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision-making. *Id.* at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable target for suits for civil damages." *Id.* at 752-53.

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the two other critical concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions and the diversion of the President's time and attention to attend to such litigation. These concerns are equally present whether the lawsuit is based on private conduct or official conduct. Defending a suit based on private conduct is not any less of an imposition on the President's ability to attend to his constitutional responsi-

bilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

A protracted lawsuit not only "ties up the defendant's time [but] prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."[19] Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.[20] As this Court has recognized, "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in . . . discovery . . . including evidence that can lead to admissible evidence." They announced that they will "fully pursue, and exhaustively pursue" allegations of purportedly related

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[19] Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992).

[20] Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 179 (1991).

wrongdoing that go far beyond the limited contacts between the President and the respondent alleged in the complaint, ostensibly for the purpose of showing an alleged "pattern" of harassment and the purported misuse of government resources. They also have suggested they will ask the trial court to compel an unprecedented physical examination of the President.[21]

No President could ignore, or leave to others to handle, a lawsuit such as this, which focuses on his personal conduct, aims to impugn his integrity, and seeks to impose hundreds of thousands of dollars in damages on him personally. Indeed, one of the most significant misconceptions in the panel majority's reasoning is the notion that the President can remain disengaged from a personal damages action brought against him. The panel majority seemed to envision that, perhaps apart from giving a deposition and consulting briefly on a few occasions with his trial counsel, the President can essentially ignore the litigation. It was even suggested that the President could forego attending his own trial. Pet. App. 23-24 (Beam, J., concurring). In fact, if the President is a defendant, he will be entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to protect his interests adequately, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; retrieve and review documents; assist counsel to prepare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks -- in a courtroom far from Washington.

[21] Transcript, *Daybreak* (CNN television broadcast, Dec. 29, 1994) at 3-4 (comments of Joseph Cammarata) (C.A. App. 117-18); Transcript, *Nightline* (ABC television broadcast, Dec. 28, 1994) at 3-4 (comments of Gilbert Davis) (C.A. App. 122-23).

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him simply does not conform to reality. The litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair not just to the President, but more importantly, to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. As this Court has envisioned, Presidents likely would become "easily identifiable target[s]" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 753. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas at the expense of the public's interest in unimpeded constitutional governance.

In particular, any President is especially vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his in-

tegrity, and thereby diminish his effectiveness as a leader. Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.[22] Use of the judicial system in this manner would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belong not to the individual who sued the President, but to the nation as a whole. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."[23]

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents

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[22] The suit against John F. Kennedy, *supra* note 17, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs believed President Kennedy's policies were inimical to their state. *Bailey*, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (C.A. App. 156). They attempted to propound politically embarrassing interrogatories to Attorney General Robert F. Kennedy, who had been the President's campaign manager. They also sought to obtain information about Kennedy family finances, and used pleadings to allege that the President was using his office to harass them and their state. *See Bailey*, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (C.A. App. 162); *Bailey*, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for $17,750, a significant sum in 1963. *Two Suits Against Kennedy Settled*, L.A. HERALD-EXAMINER, Apr. 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

[23] Amar & Katyal, *supra* note 6, at 713.

against meritless lawsuits filed for purposes of harassment, publicity or partisanship. *See* Pet. App. 15; Resp. C.A. Br. 30, 32-33. But those devices are far from foolproof, and for a variety of reasons, are likely to be ineffective in protecting the President.

The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, and will not risk sanctions under Rule 11 of the Federal Rules of Civil Procedure if the suit is found to be frivolous. But financial restraints are overcome by other incentives when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations against such figures in a complaint filed in court. The notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived, as a President surely would be, as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms of extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And a party whose objective is to divert the President's energy and resources, or to uncover information through discovery, or to embarrass the President by making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss or for summary judgment promise swift or painless relief for the target of meritless litigation. A potential private action easily could be drafted to entangle a President in embarrassing or protracted litigation simply by alleging claims based on unwitnessed one-on-one encounters, or by otherwise raising credibility issues. These kinds of claims are exceedingly difficult to dispose of under the standards that govern pre-trial motions. And, as Chief Justice Burger recognized in *Fitzgerald*, "even a lawsuit ulti-

mately found to be frivolous . . . often requires significant expenditures of time and money" to defend. "Ultimate vindication on the merits does not repair the damage." 457 U.S. at 763 (Burger, C.J., concurring).

4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.

The respondent and the panel majority below minimized the disruptive effect of civil litigation on the Presidency by comparing the full-scale defense of a personal damages action to the few occasions when a President has testified as a non-party witness in a criminal or legislative proceeding. *See* Pet. App. 22-23 (Beam, J., concurring). This comparison is not plausible. The isolated event of giving testimony in a proceeding to which one is not a party bears no resemblance to the burdens borne by a defendant in a civil action for damages. In fact, the lesson of cases involving Presidential testimony is more nearly the opposite of what respondent and the panel majority say: those cases show that requiring an incumbent President to submit as a defendant in a private damages action would go beyond anything a court has done before, with less justification.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. *See, e.g., Fitzgerald*, 457 U.S. at 754; *United States v. Gillock*, 445 U.S. 360, 371-72 (1980). Not only is the public interest in the accurate outcome of a criminal prosecution far greater, *see, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935), but the defendant has a constitutional right under the Compulsory Process Clause of the Sixth Amendment to obtain evidence in a criminal proceeding. *United States v. Burr*, 25 F. Cas. 30, 33

(C.C.D. Va. 1807) (No. 14,692d). This right, of course, has no constitutional counterpart in civil cases.

Only once in our history, in *United States v. Nixon*, 418 U.S. 683 (1974), has the Supreme Court required a sitting President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court expressly declined to extend its holding to civil proceedings. *See Nixon*, 418 U.S. at 709-10, 711-12 & n.19. In addition, the Court quoted, not once but twice, Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Id.* at 708 and 715 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694)).

Consistent with *Nixon* and *Burr*, lower courts have required a strong showing of need for the President's testimony.[24] Even then, courts have allowed it to be obtained only in a manner that limits the disruption of the President's offi-

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[24] *See Nixon*, 418 U.S. at 713 (subpoena enforced against the President because there was a "demonstrated, specific need for evidence in a pending criminal trial"); *see also United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996) (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (quoting *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990)); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena to President when defendant failed to show "that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

cial functions, such as by videotaped deposition.[25] Thus, obtaining even third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need or where the constitutional right to compulsory process is at stake.

Neither of these factors is present, however, in ordinary civil litigation. Criminal prosecutions additionally carry certain important safeguards that are absent in civil litigation: they must be approved by a public official, premised on a finding of probable cause, and often require approval by a grand jury. Civil litigation, by contrast, can be filed by any individual out of any motive. Accordingly, this Court has been careful never to suggest that a sitting President could be compelled even to give evidence as a third party in a civil proceeding. *See United States v. Nixon*, 418 U.S. at 712 n.19.

The issue here, of course, is not whether the President can be compelled to testify as a mere witness. It is, rather, whether he can be sued as a defendant. Whatever difficulties may be involved in arranging for the President to testify as a third-party witness, those difficulties would be increased exponentially if the President were made a defendant in a civil action for damages, which has the potential to interfere much more severely, over a much more extended period, with his ability to fulfill the unique and extraordinarily demanding responsibilities of his office. It would be highly incongruous to subject the President -- and the nation -- to these burdens solely on the basis of a civil complaint filed against him by a private party, when the alternative -- deferral -- avoids these problems entirely and provides reasonable protection for the interests of all parties.

[25] *See Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged Presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *Branscum*, *supra* note 24 (videotaped deposition); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parts would be shown at trial); *Poindexter*, 732 F. Supp. at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

B. "Case Management" By The Trial Court Does Not Mitigate, But Instead Exacerbates, The Separation Of Power Problems Created By Suits Against An Incumbent President.

1. "Case Management" By Federal District Courts Impermissibly Entangles The Branches Of Government By Permitting Courts To Examine, And Re-order, Executive Branch Priorities.

Even the panel majority did not deny that private damages actions against a sitting President threaten to interfere with the integrity of the Executive Branch and to undermine the separation of powers. Its solution to these problems, however, was not deferral, but was instead "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. This supposed cure is worse than the disease. "Case management" by the judiciary of a suit against the Chief Executive entangles the two branches in an ongoing and mutually harmful relationship, instead of maintaining the separation of the branches, as the Constitution envisions.

The panel majority suggested that throughout the litigation, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. Under this approach, the President would have to provide detailed information about the nature of pending Executive Branch matters requiring his attention, and the trial judge would have to pass judgment on the President's priorities. If the trial court -- state or federal -- decided that the President should devote more time

to the private litigation than to official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* FED. R. CIV. P. 16(f). If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16.

Such a state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate for the courts to insist on answers to the kinds of questions that inevitably would be posed under this regime. In situations involving matters of national security, sensitive diplomatic issues, or confidential intelligence or law enforcement operations -- to take just a few obvious examples -- the trial judge immediately would be enmeshed in disputes that could ripen into deeply troubling constitutional confrontations. Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers, both foreign and domestic. It is therefore not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis, while simultaneously having to attend to the urgent matter at hand.[26]

[26] The experiences of Presidents Carter and Reagan provide dramatic examples: when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided to remain in Georgia, but participated in meetings by way of telephone. CANNON, *supra* note 7, at 441-42. Similarly, during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to

(continued . . .)

In such circumstances, simply having to ask a court for a change in the litigation schedule obviously could be highly damaging.

Even in areas not involving sensitive foreign or domestic concerns, a trial court would, under the panel's "case management" approach, be able to second-guess judgments that are properly made only by the President. A myriad of important Presidential activities might warrant a change in a litigation schedule: foreign or domestic travel; contacting members of Congress to persuade them to vote for legislation; meetings with groups of citizens to call public attention to an issue; intensive briefings from advisers on complex subjects. If the President moved for a change in the litigation schedule to accommodate these interests, the denial of such a motion would effectively preempt the priorities of the Executive Branch.[27]

The panel majority seemed to believe that untoward consequences can be averted so long as "case management" is "sensitive" enough to the demands of the President's office. Pet. App. 13. But this misunderstands both the nature of the problem and the nature of separated powers. Because the President embodies a branch of government, his priorities *are* the priorities of the Executive Branch. It follows that "case management," when the President is the defendant, necessar-

[26](. . . continued)
[his] regular schedule and act as though nothing of the kind was going on." CARTER, *supra* note 9, at 514.

[27] President Carter, for example, cut short a vacation to return to Washington to urge the passage of natural gas legislation that he deemed crucial to his national energy policy. CARTER, *supra* note 9, at 322. If the President had been involved in some aspect of litigation rather than on vacation, under the panel majority's scenario, he would have had to ask a court -- perhaps even a state court -- for permission to change his plans. The court then would be deciding if the President's interest in passage of the natural gas legislation was sufficiently important to warrant an interruption in judicial proceedings.

ily means management of the business of the Executive Branch -- both in setting priorities for the President's time and in controlling the disclosure of information about the President's schedule.

"Case management" by trial judges not only threatens the independence of the Executive from the Judicial Branch; it also unfairly places judges in a position they should not have to occupy -- the political arena. In suits against the President, the trial judge will be operating in an atmosphere that is almost certain to be highly charged politically. Any significant decision that a judge makes will be scrutinized for signs of partisan bias for or against the President. Decisions that are routine in any other case, such as a decision to postpone the defendant's deposition, will if the President is the deponent become the subject of partisan speculation and comment.

Moreover, judges attempting to assess the sufficiency of a President's explanation inevitably will be asked to distinguish between a President's "political" activities, on the one hand, and his "official" activities on the other. Political activity, of course, is one of the responsibilities of a democratically-elected official, and, as has often been recognized, these kinds of distinctions are inappropriate for judges to make.[28] These problems can, and should, be avoided altogether by holding the litigation in abeyance until the defendant is no longer President.

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[28] *See United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (courts lack "manageable standards" by which to distinguish between political and official functions), *cert. denied*, 455 U.S. 999 (1982); *Winpisinger v. Watson*, 628 F.2d 133, 140 (D.C. Cir.) (claim deemed not justiciable because it required judicial determination of whether executive actions were motivated by genuine concern for public interest or by "political expediency"), *cert. denied*, 446 U.S. 929 (1980).

2. "Case Management" By State Trial Courts Is Inconsistent With Principles Of Federalism Inherent In The Constitutional Scheme.

Perhaps the clearest evidence of the superiority of deferral to "case management," given the postulates of our constitutional system, emerges when one considers that if private civil actions can be brought against a sitting President, they are likely to be brought in state courts. Two of the claims in this case are state tort claims, and one would expect that civil suits in damages against a President for matters unrelated to his official duties will often, as here, involve causes of action under state law.[29] If suit is brought in state court, decisions about the activities and priorities of the Executive Branch of the federal government will be made in the first instance by state trial court judges, including those chosen by partisan election. The President, moreover, may not be able to obtain immediate review of these decisions in a federal forum. The availability of interlocutory review would turn on the judicial procedures of the state forum, and then, the only federal forum available to the President would likely be this Court.

The vast majority of state judges would, of course, be highly conscientious in carrying out their responsibilities in such a situation, but even the possibility that an incumbent President could be subject to the jurisdiction of a state court further demonstrates that suits against a sitting President are inconsistent with our constitutional scheme. The Framers were well aware that state governments might come into conflict with the federal government, and particularly with the Executive Branch. It would take little ingenuity to contrive a

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[29] In the absence of diversity jurisdiction, suits based on a President's personal conduct ordinarily would not be removable. *See* 28 U.S.C. §§ 1441(b), 1442(a) (1994); *Mesa v. California*, 489 U.S. 121, 138-39 (1989).

state law damages action against a President unrelated to the conduct of his office. In an atmosphere of local partisan hostility to the President, the ability to bring such a suit in state court would be a powerful weapon in the hands of state interests -- one that the Framers could not possibly have intended to permit. This is further evidence that the approach most faithful to our constitutional scheme is not "case management," but the simple deferral of litigation until after the President leaves office, at which time any risk of disruption of the orderly functioning of the Executive is eliminated.

C. The Relief Sought Here Is Not Extraordinary, And Would Not Place the President "Above The Law."

A recurrent theme of both respondent and the panel majority is that the President's claim in this case is somehow extraordinary, both in the relief that it seeks and in the burden that it would place on respondent. This is wrong. The relief that the President seeks does not provide, in the panel majority's words, a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)". Pet. App. 13. On the contrary, the relief that the President seeks is afforded in a variety of circumstances to public officials and private citizens alike. At the same time, the burdens that temporary deferral of the litigation would impose on plaintiffs are limited and reasonable.

1. Deferring Litigation Is Not Extraordinary.

The deferral that the President seeks is properly classified with an unexceptional group of doctrines that provide for litigation to be stayed to protect important institutional or public interests. There are numerous such instances where civil plaintiffs must accept the temporary postponement of litigation:

- The automatic stay provision of the Bankruptcy Code provides that litigation against a debtor must be stayed as soon as a party files a bankruptcy petition. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition of delay on the plaintiff's claims. The stay ordinarily remains in effect until the bankruptcy proceeding is completed or the bankruptcy court lifts the stay. 11 U.S.C. § 362 (1994). That stay affects all litigation that "was or could have been commenced" prior to the filing of the petition. *Id.* Under this provision, civil actions can be stayed for extended periods.[30] Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in a position similar to that she would be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.

- Courts defer civil litigation until the conclusion of a related criminal prosecution against the same defendant, if doing so is in the interests of justice or the public's interest in criminal law enforcement. That process may, of course, take several years. During that time, the civil plaintiff -- who may have been injured by a party who engaged in criminal conduct -- is afforded no relief.[31]

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[30] *See, e.g., Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Panzella v. Hills Stores Co.*, 171 B.R. 22, 23 (E.D. Pa. 1994). A bankruptcy judge also has discretion to order a stay even of third-party litigation, to which the debtor is not a party, if that litigation conceivably could have an effect on the bankruptcy estate. *See* 11 U.S.C. § 105 (1994); 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

[31] *See, e.g., Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967).

- The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), permits civil claims by or against military personnel to be tolled and stayed while they are on active duty. It provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act.[32]

- The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 302-06 (1973). The process, which can take several years, is needed to ensure that a regulatory agency will be able to pursue its institutional agenda in an orderly fashion. *See, e.g., United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).

- Public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals routinely can delay litigation for a substantial period, even though the official ultimately may be found not to be entitled to immunity. In fact the stay attaches only in those cases where a trial court has initially rejected the claim of immunity.

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[32] President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation. Rather, the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of powers.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples dispel any suggestion that the President, in asking that this litigation be deferred, is somehow seeking extraordinary relief, or that holding this or any other litigation in abeyance violates a plaintiff's right to access to the courts.

2. Presidents Remain Accountable For Private Misconduct.

The panel majority, invoking the term "immunity," also suggested at various points that the President was seeking a rule that would bar liability for alleged wrongful conduct committed outside the scope of his official responsibilities. This is untrue. The President seeks only to defer the litigation until he leaves office. He remains accountable for his conduct and will be amenable to potential liability at that time. Accordingly, relieving a President temporarily of the requirement to defend private civil damages action does not, as the respondent suggests, place the President "above the law." Resp. C.A. Br. 9.

Deferring damages litigation manifestly does not give Presidents free license to engage in private misconduct. As this Court has observed, there are formal and informal checks quite apart from civil damages that deter unlawful, tortious or unconstitutional behavior by Presidents or those who may run for office in the future. These include the prospect of impeachment in egregious cases, as well as "constant scrutiny by the press." *Fitzgerald*, 457 U.S. at 757. Plaintiffs can take their charges to the newspapers and broadcast media, as has been done here. "Other incentives to avoid misconduct . . . include a desire to earn reelection," *id.*, or in the case of those who seek the Presidency, the desire to be elected in the first instance. Further deterrence may be found in the concern of a President "for his historical stature." *Id.* And of course, a President would still remain liable for damages after leaving office.

Indeed, deferral stands in sharp contrast to much more sweeping protection -- absolute or qualified immunity from damages -- that the law provides to literally tens of thousands of public employees. These immunity doctrines do not just delay litigation, but leave innocent victims wholly without compensation, sometimes even in cases where an official's conduct amounts to gross abuse of individual rights.[33] Similarly, diplomats, members of their families and foreign heads of state are wholly immune from liability in this country, even for personal misconduct and criminal acts.[34] In all these cases, protection from liability is needed to "advance compelling public ends." *Fitzgerald*, 457 U.S. at 758. Temporarily excusing the President from the burdens of private civil litigation, a far more modest accommodation, serves even more "compelling public ends."[35]

[33] For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978), a judge was held absolutely immune from damages notwithstanding undisputed allegations that he ordered a mildly retarded teenager sterilized in an *ex parte* proceeding, without a hearing, without notice to the young woman, and without appointment of a guardian *ad litem*. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor was held absolutely immune from damages even though the plaintiff had obtained habeas corpus relief on the ground that the prosecutor knowingly used false testimony at a trial which led to plaintiff's murder conviction and death sentence.

[34] *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Skeen v. Brazil*, 566 F. Supp. 1414 (D.D.C. 1983); *In re Terrence K.*, 524 N.Y.S.2d 996 (N.Y. Fam. Ct. 1988). Head-of-state immunity, founded on long-standing principles of international common law, permits heads of state, including our own, "to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *Lafontant*, 844 F. Supp. at 132. Diplomatic immunity, founded on the Vienna Convention, is a reciprocal immunity that exists "[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates." *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996).

In sum, the President asserts a limited form of protection that is calibrated to accommodate a plaintiff's right to seek redress in the courts and the right of the people to have the person they elected President available to perform the unique and demanding responsibilities of that office. Because the plaintiff's right ultimately to seek redress is preserved, deferral also is in accordance with Chief Justice Marshall's declaration that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

II. THE LITIGATION OF THIS PARTICULAR PRIVATE DAMAGES SUIT AGAINST THE PRESIDENT SHOULD, IN ANY EVENT, BE DEFERRED.

A. Several Factors Weigh Heavily In Favor Of Deferring This Litigation In Its Entirety.

Even if it were determined that temporary insulation from private civil damages litigation is not presumptively mandated in every case involving the President, there remains the question of whether, under principles enunciated in this Court's separation of powers cases, litigation of this particular nature should go forward while the President is in office. We respectfully submit that it should not.

[35] Indeed, while we seek here only to defer the plaintiff's opportunity to pursue redress, we note that courts have, with few qualms, denied damages remedies altogether in other cases. "It never has been denied that . . . immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Fitzgerald*, 457 U.S. at 754 n.37.

In *Fitzgerald*, the Court framed the analysis that must be undertaken as follows: "a court, before exercising jurisdiction [over a President], must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. As the Court recently explained, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996). Accordingly, when action by another branch -- in this case the judiciary -- has "the potential for disruption" of Executive Branch functions, a court must "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the Judicial Branch. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (hereinafter "*Nixon v. GSA*").

Providing a forum for the redress of civil rights and common law torts is, of course, an appropriate and important objective within the constitutional authority of the federal judiciary. The issue here, though, is whether there is an "overriding need" to promote this objective at this time, if doing so has the potential to disrupt the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). Temporarily deferring this litigation does just that.

Under the separation of powers principles elaborated in *Fitzgerald*, *United States v. Nixon*, and *Nixon v. GSA*, there is no justification for requiring this litigation to proceed while the President is in office. First, this suit involves the President both directly and personally. He is not a peripheral figure or one among many co-defendants. As the district court found, he is the "central figure in this action." Pet. App. 77. Moreover, given the nature of the allegations, this is the kind of litigation that he must attend to personally. It alleges

events in which only he and the respondent purportedly were involved, and directly attacks his reputation and integrity. Such litigation cannot be handled by, for example, the President's accountants or business associates. As discussed above, litigation of this nature is especially disruptive, because it would require the President's personal time and attention.

Second, this suit concerns alleged pre-Presidential conduct, rather than unofficial conduct that the President engaged in while in office. In a case of this kind, the plaintiff's need to press a claim during the President's incumbency is less compelling, because the plaintiff generally will have had an opportunity to sue before the President was elected, as was the case here. The public interest in allowing the suit to go forward is also less, because there is no risk that the defendant was seeking to take advantage of the Presidency at the time of the alleged wrong.

Third, and related, this is a case in which the plaintiff's delay in bringing suit after the President was elected is not readily understandable. Respondent claims that deferring the suit will prejudice her interests, but respondent is the author of her own predicament. This case does not involve a latent harm that only became known long after the fact. The facts alleged in the complaint were known to respondent at once, and the claims accrued well before the President took office. Moreover, respondent chose not to pursue other available avenues of potential recovery, such as a timely claim under Title VII, or a suit against the publisher and the author of the article in which she was allegedly defamed. Respondent instead waited three years to act, filing barely within the limitations period for civil rights actions, 16 months after the defendant became President. Irrespective of whether the doctrine of laches should formally apply, these facts suggest that deferral is especially appropriate here. When the plaintiff has delayed extensively before suing, there is reason to think that further delay will not harm the plaintiff's interests. By the

same token, when a plaintiff waits to bring suit based on pre-Presidential conduct until the President is elected, and chooses not to pursue other available remedies, the danger that the suit was prompted by illegitimate motives is obviously greater.

Finally, as the district court observed, "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Respondent seeks only damages. If she ultimately prevails, she will be made whole regardless of the delay.[36] Respondent also does not identify any special need for the damages she seeks and, in fact, has stated that she intends to donate any award to charity.[37] Again, in a suit seeking only damages, where a plaintiff can be made whole by prejudgment interest and has disclaimed personal or expedient need for financial recovery, the danger that respondent will be prejudiced is diminished, and the justification for the potential interference with the functioning of the Executive Branch is even further diminished.

Respondent's interest in vindicating her asserted rights, and the judiciary's interest in providing a forum for vindicating such rights, are not significantly impaired by deferring this litigation. When the burden on the Presidency is compared with the very minimal impairment of these interests, it becomes clear that this litigation should be deferred in its entirety until the President leaves office.

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[36] Prejudgment interest generally is available in appropriate circumstances under 42 U.S.C. § 1983 (1994). *See Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991). Prejudgment interest also is available under Arkansas law in appropriate cases. *Wooten v. McClendon*, 612 S.W.2d 105 (Ark. 1981) (prejudgment interest available in contract and tort actions, provided that at time of injury, damages are immediately ascertainable with relative certainty).

[37] Transcript, *CNN: Paula Jones Interview* (CNN television broadcast, June 27, 1994) (C.A. App. 85).

B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained.

1. The Court Of Appeals Lacked Jurisdiction Over Respondent's Cross Appeal.

Respondent cross-appealed below to challenge the district court's order to stay trial. A district court's decision to stay proceedings, however, is ordinarily not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). While such orders may in some circumstances be reviewed on an interlocutory basis by way of writ of mandamus (*see* 28 U.S.C. § 651 (1994)), respondent never sought such a writ.[38]

Respondent instead asserted that the court of appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. The panel majority agreed, even though this Court recently ruled that "pendent appellate jurisdiction" should not be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995).

Swint exhibits strong skepticism toward the type of pendent jurisdiction exercised in this case. There, the Court explained that under 28 U.S.C § 1292(b), Congress gave a district court "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable," thus

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[38] Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." *See, e.g., Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, spondent did not assert this ground as a basis for jurisdiction, perhaps in recognition that it clearly is not applicable here, where the district court's order contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

> confer[ring] on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

115 S. Ct. at 1210 (footnote omitted). Notwithstanding this language, and without any certification of the issue by the district court, the Eighth Circuit asserted pendent appellate jurisdiction over the respondent's interlocutory appeal of the stay of trial.[39]

The panel majority reasoned that *Swint* did not apply because respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4. *See Swint*, 115 S. Ct. at 1212. The issues in the two appeals were not, however, "inextricably intertwined." That these two appeals raise very distinct issues is evident from the distinct nature of the inquiries they generate. The issue of whether the President can defer litigation raises a question of law; the issue of whether a district court can stay litigation is a discretionary determination based on the facts of a particular case. While a district court's legal decisions are entitled to no special deference, its exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion. *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936).

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[39] Since *Swint*, numerous other circuit courts have eschewed asserting pendent jurisdiction in appeals such as this. *See Woods v. Smith*, 60 F.3d 1161, 1166 & n.29 (5th Cir. 1995), *cert denied*, 116 S. Ct. 880 (1996); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty v. Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

The district court here, in deciding to postpone trial, invoked its discretionary powers over scheduling. Pet. App. 71 (citing FED. R. CIV. P. 40). The court then expressly based its decision on the particular circumstances of this case:

> This is not a case in which any necessity exists to rush to trial. . . . Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.
>
> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court . . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

As this passage makes clear, the district court's decision to stay trial rested upon the particular facts at hand, and review of that stay -- unlike review of its decision to reject the President's position that the entire case must be deferred as matter of law -- must address these particular facts. Accordingly, even if the concept of "pendent appellate jurisdiction" survived *Swint*, the two appeals here were not "inextricably intertwined," and the panel majority's exercise of such jurisdiction over the interlocutory appeal was erroneous.

2. The Court Of Appeals Erred In Reversing The District Court's Decision To Stay Trial In This Case.

The district court clearly had the authority to stay trial in this case. In *Landis*, Justice Cardozo wrote for this Court that

> the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

299 U.S. at 254-55. Indeed, the Court in *Landis* specifically stated that

> *[e]specially in cases of extraordinary public moment*, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.

Id. at 256 (emphasis added). Obviously, a trial here, which would require the heavy involvement of a sitting President, is a case of "extraordinary public moment."

The panel majority in this case showed none of the deference to the district court's determination required by *Landis*. Instead, it rejected the trial court's order with a single sentence: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. This sweeping and conclusory ruling hardly represents the careful weighing of particular facts and circumstances necessary to support a conclusion that the trial court abused its discretion.

The district court, by contrast, specifically assessed the case and appropriately concluded that trial here should not proceed. For all the reasons enumerated above, the trial court found that it simply would not be possible to try the case without enormous and extraordinary demands on the President's time, and that the respondent's interests would be substantially preserved notwithstanding the stay. Due to these case-specific factors, the district court correctly stayed trial until the President left office. That decision was not an abuse

of discretion and, if reviewed at all, should have been sustained.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed, and this litigation should be held in abeyance, in its entirety, until the President leaves office.

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